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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 500

R. A. HOLMAN & CO., INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a–9a) is not yet reported. The order of the district court (Pet. App. 1a–3a) was entered without written opinion; the oral opinion of the district court is set forth at JA 166–167.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1963, and a petition for rehearing *en banc* was denied on August 1, 1963 (Pet. App. 9a). The petition for a writ of certiorari was filed on Septem-

[1] "JA" refers to the joint appendix in the court of appeals.

ber 27, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly reversed an injunction preventing the Securities and Exchange Commission from conducting an administrative proceeding to determine whether to revoke the registration of a broker-dealer, where the injunction was based on the fact that a member of the Commission had had prior supervisory responsibility for a related matter while a member of the Commission's staff and was issued without regard to whether he had personally participated in such matter.

STATUTES INVOLVED

Section 25(a) of the Securities Exchange Act of 1934, 48 Stat. 901, 15 U.S.C. 78y(a), provides in pertinent part:

> Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the United States Court of Appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *

Section 5(c) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. 1004(c), provides in pertinent part:

> * * * No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not * * * be applicable in any manner to the agency or any member or members of the body comprising the agency.

STATEMENT

Petitioner is a broker and dealer in securities registered with the Securities and Exchange Commission under Section 15(b) of the Securities Exchange Act of 1934. On September 26, 1960, the Commission instituted a proceeding to determine whether (1) to revoke or suspend petitioner's registration and (2) to expel or suspend it from membership in the National Association of Securities Dealers (JA 91–97). The Commission charged that petitioner had violated the securities registration provisions of the Securities Act of 1933 and the antifraud provisions of that Act and of the Securities Exchange Act of 1934 in connection with its underwriting of public distributions of the securities of Pearson Corporation (JA 91–97) and Precise Development Corporation (JA 98–108). The evidentiary hearings have not yet been concluded and the instant case represents petitioner's second attempt to enjoin the administrative proceeding.[2] During the pendency of the proceeding peti-

[2] See *R. A. Holman & Co., Inc.* v. *Securities and Exchange Commission*, 299 F. 2d 127 (C.A.D.C.), certiorari denied, 370 U.S. 911.

tioner has continued as a registered broker and dealer in securities and a member of the National Association of Securities Dealers.[3]

On June 4, 1962, petitioner filed with the Commission a motion to discontinue the administrative proceeding or, alternatively, to have the Commission hold a full evidentiary hearing to determine whether any member of the Commission should be disqualified from participating in the proceeding because of his prior service on the Commission's staff (JA 12). Nine days thereafter, before the Commission had ruled upon the motion, petitioner commenced the present action in the district court to enjoin the proceeding (JA 1, 68).[4]

Petitioner's complaint alleged that Commissioner Woodside had been director of the Commisssion's Division of Corporation Finance on March 30, 1960, and continued as such until July 16, 1960, when he became a member of the Commission (JA 7); that on March 30, 1960, Pearson Corporation filed with the Commission a registration statement for the offer and sale of its common stock, which named petitioner as underwriter (JA 4); that "on information and belief" during the month of April 1960, the Division

[3] Petitioner may act as an underwriter of securities issues where a registration statement has been filed with the Commission but, without prior Commission approval, it may not underwrite securities issues exempt from registration pursuant to Regulation A under the Securities Act of 1933. See 17 C.F.R. 230.252(e)(2).

[4] Petitioner named as defendants the Commission and the five Commissioners (JA 3). The Commission's hearing examiner, who was also named as a defendant, was not served with process (JA 1-2, 40).

of Corporation Finance instituted an "informal investigation" into circumstances relating to an earlier public offering of Pearson stock, also underwritten by petitioner (JA 5–6); that the pending administrative proceeding stemmed from charges made as a result of that "informal investigation" (JA 6); and that "on information and belief" Mr. Woodside, who as a member of the Commission had participated in various quasi-judicial rulings during the proceeding, had participated in the "informal investigation" and had thereby acquired substantial knowledge of the facts in issue in the proceeding (JA 7–8, 12).[5]

The Commission (and its members) filed a lengthy answer and two affidavits setting forth in detail the pertinent facts (JA 61–130). The Commission specifically denied the allegations (1) that Mr. Woodside had participated in any investigation relating to petitioner's activities in connection with the stock of Pearson Corporation and (2) that he thereby acquired substantial knowledge of the facts which were involved in the administrative proceeding (JA 64). The answer admitted that Mr. Woodside was participating in the administrative proceeding and that previously, as director of the Division of Corporation Finance, he had had ultimate responsibility to the Commission for all work of that Division (JA 66, 64); that while he was the director the Division

[5] It was also alleged that another member of the Commission, Manuel F. Cohen, was disqualified from participation because of prior staff service and that the hearing examiner was disqualified because he had passed the age of mandatory retirement. Neither of these alleged infirmities was relied upon by the district court and petitioner does not rely upon them now.

had processed a registration statement filed by Pearson Corporation; and that the processing of that registration statement, which was later withdrawn before it became effective, led to the review of an earlier financing by Pearson Corporation (JA 68–70). The answer also stated (JA 70–71, 91, 120) that both the formal investigation (initiated on the recommendation of another division—that of Trading and Exchanges) which led to the present administrative proceeding and the proceeding itself were instituted after Mr. Woodside became a Commissioner. The assistant director of the Division who had supervised the examination of the Pearson registration statement filed an affidavit that he had not consulted with Mr. Woodside with respect to the Pearson matter while Mr. Woodside was director (JA 131–132).

The district court granted a preliminary injunction against further conduct of the administrative proceeding, and gave the Commission the option of dismissing the proceeding or conducting an evidentiary hearing on the question of disqualification and reporting to the court the results thereof (JA 138–139). The order was based upon the finding that Commissioner Woodside, having participated as a commissioner in determinations in the administrative proceeding, had "previously while Director of the Commission's Division of Corporation Finance * * * had responsibility for the processing of a registration statement of Pearson Corporation, a related matter," and the court considered it immaterial whether he personally participated in such processing (JA 137). The court deemed the preliminary injunction appropriate under *Amos Treat & Co.* v. *Securities*

and Exchange Commission, 306 F. 2d 260 (C.A.D.C.), in which the court of appeals had enjoined the Commission from conducting a similar proceeding on the basis of a somewhat similar claim that a Commissioner's past connection with a case while a member of the staff disqualified him from participating in the proceeding.

The court of appeals reversed, holding that petitioner had not presented such an "exceptional case" (Pet. App. 7a) as would warrant immediate injunctive relief. The court stated (*ibid.*) that petitioner's claims should in the first instance be developed before the agency, and that the propriety of Commissioner Woodside's participation could be determined upon judicial review of any order the Commission ultimately might issue against petitioner. The court found the *Amos Treat* case, *supra,* to be "factually distinguishable," noting that the record there showed that the Commission had not denied the plaintiff's allegations of the claimed disqualifying factors,[6] while in the present case, the Commission had affirmatively asserted that Commissioner Woodside had not participated in either the processing of the Pearson registration statement or the staff's recommendation to institute the proceeding (Pet. App. 6a).[7]

[6] No answer had yet been filed when that case went to the court of appeals.

[7] The court's reference to the Commission's assertion that Mr. Woodside had not participated in the processing of "Holman's application" (Pet. App. 6a) was apparently intended to refer to the Pearson registration statement.

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ARGUMENT

The court of appeals' decision represents a proper application to the facts of this case of the settled principle of administrative law that the courts ordinarily will not enjoin an administrative hearing where the moving party will have adequate opportunity to litigate the question upon subsequent judicial review of any final order the agency may issue. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535; *Securities and Exchange Commission* v. *Otis & Co.*, 338 U.S. 843. Contrary to petitioner's contention (Pet. 11), the court of appeals did not deny the district court the right to "exercise its traditional powers and determine the true facts even where petitioner has made a *prima facie* showing of procedural irregularity raising basic constitutional questions." The court held (Pet. App. 7a, 8a) only that petitioner had not presented "the exceptional case * * * warranting judicial intervention before the regulatory agency has completed its processes," and that—

> For the present purpose it is sufficient to hold, and we do hold, that the petitioner may constitutionally be required to present all the pertinent facts in the prescribed administrative proceeding and may there raise, and ultimately may present for judicial review, any legal question which may arise as the facts are developed [*Anniston Manufacturing Co.* v. *Davis*, 301 U.S. 337, 353].

This conclusion was plainly correct.

While petitioner's complaint alleged "on information and belief" that Commissioner Woodside had

acquired knowledge of certain facts at issue in the administrative proceeding through his participation in a prior investigation of a related matter which took place while he was on the Commission's staff, the Commission filed affidavits which, the court of appeals pointed out (Pet. App. 6a), "affirmatively assert[ed]" that Mr. Woodside had not even participated in the examination and study of the Pearson Corporation registration statement—an examination and study which, petitioner contended (JA 8), was the "informal investigation" which led to the institution of the administrative revocation proceeding against petitioner. The mere assertion of such a claim of disqualification made "on information and belief" but without any supporting facts, and specifically disputed by the agency, is plainly not enough to establish the kind of "exceptional case" (Pet. App. 7a) which might warrant judicial intervention during an administrative proceeding. As the court of appeals pointed out (*ibid.*), "such claims as the [petitioner] has here presented should be adduced in the first instance at the administrative level * * *." If the Commission ultimately should issue an order which adversely affects petitioner, on judicial review of such order it may urge that Commissioner Woodside was disqualified. Indeed, the court noted (*ibid.*) that it had previously "indicated that at that stage we will scrutinize the issue of disqualification with great care." See *Trans World Airlines* v. *Civil Aeronautics Board*, 254 F. 2d 90 (C.A.D.C.).

The fact that the injunction was here sought because of the alleged disqualification of a member of the

agency affords no basis for departing from the usual rule against enjoining the conduct of administrative proceedings. For the considerations which underlie the rule—the desirability of avoiding disruption of the administrative process, the appropriateness of permitting the agency itself fully to develop the pertinent facts and to pass upon the claim in the first instance, and the availability of full judicial review of the contention in connection with review of any final agency order—are no less applicable to claims of this character than to other claims of procedural and substantive error on the basis of which the courts consistently have declined to prevent an agency from going forward with its cases.

The decision of the court below is not in conflict with the decisions of the Second and Ninth Circuits cited by petitioner (Pet. 11–12). The two decisions of the Second Circuit[8] merely recognized the authority of the district court to enjoin the National Labor Relations Board from conducting a proceeding where

[8] While the Commission in the past has stated that claims of personal bias and prejudice should be ruled on in the first instance by the Commissioner who is challenged, neither it nor Commissioner Woodside has yet ruled upon petitioner's motion to disqualify him. As noted, petitioner instituted the present injunction action only nine days after it filed its motion for disqualification, and the Commission has refrained from acting thereon pending completion of the judicial proceeding. Petitioner thus errs in stating (Pet. 13) that the Commission "has already declined" to pass upon Commissioner Woodside's participation.

[8] *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222, vacated without opinion *sub nom.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10; *Fay* v. *Douds*, 172 F. 2d 720.

its continuation would allegedly either deny constitutional rights or would cause serious problems of international relations. The court of appeals in the present case did not deny the power of a district court to act in such circumstances, but merely held that the present situation was not such an "exceptional case" (Pet. App. 7a) as would justify such extraordinary relief. The other case with which a conflict is asserted—*Federal Home Loan Bank Board* v. *Long Beach Federal Savings & Loan Association*, 295 F. 2d 403 (C.A. 9)—was not an action to enjoin an administrative hearing, but was a proceeding to enforce subpoenas issued by a trial examiner, in which the court had to determine the legality of the examiner's appointment in order to ascertain whether the subpoenas had been lawfully issued. And, as noted, the court below distinguished its earlier *Amos Treat* decision, upon which petitioner so heavily relies, on the ground that since the Commission there had not denied the facts upon which disqualification was sought, the record in that case supported the claim that the Commissioner had personally participated in the prior related matter, whereas in the present case the Commission had denied the allegation of such participation.

To permit a litigant before an administrative agency to interrupt the administrative proceeding on the basis of a claim of improper participation by an agency member arising out of his past service on the agency's staff, the factual basis of which is disputed, would be seriously detrimental to the proper functioning of the administrative process. As the court of appeals ex-

plained (Pet. App. 7a–8a): "To stay the administrative processes while a court was engaged in an extended inquiry into the claimed disqualification of members of the administrative body could lead to a breakdown in the administrative process which has long been criticized for its slow pace." The court was thus fully justified in concluding (Pet. App. 7a): "The administrative proceedings cannot be stopped to allow for excursions in the courts with prolonged evidentiary hearings; the time for that in a proper case is when an aggrieved litigant seeks judicial review of agency action having preserved the point of claimed disqualification in the administrative hearing."

Petitioner adds nothing to its case by claiming that Commissioner Woodside's participation violated the prohibitions of Section 5(c) of the Administrative Procedure Act (5 U.S.C. 1004(c)). Even if they should apply to one who is a member of the agency at the time of his participation in an agency decision, they do not apply unless he "engaged in the performance of investigative or prosecuting functions * * * in that or a factually related case * * *." That question, as we have shown, is one to be tried out, if necessary, in the ordinary administrative channels.

Nor can petitioner successfully circumvent the established rules requiring exhaustion of administrative remedies by labelling his argument a denial of due process. This Court has noted "that most matters relating to judicial disqualification did not rise to a constitutional level" (*Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 702; see *Tumey* v. *Ohio*, 273 U.S. 510, 523), and the constitutional rule is

certainly no stricter with respect to the disqualification of members of the administrative agencies. Due process does not prohibit someone who had merely general formal supervisory responsibility for an investigation but who did not personally participate in it from subsequently participating in the adjudication of a case which developed therefrom. Any further question should be decided in the normal course of agency proceedings followed by judicial review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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